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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

ANTHONY JOSEPH RUSSO, JR., H. PETER YOUNG,
Petitioners,

vs.

JOHN N. MITCHELL, et al, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether in a damages action brought against a government official arising out of warrantless electronic surveillance, the official can prevail on summary judgment by asserting that his decision to authorize such surveillance was not clearly foreclosed by settled law if the authorization and interception activity preceeded this Court's decision in United States v. United States District Court (Keith) 407 U.S. 297 (1972) and if there was an objective basis for a claim that the surveillance would protect the national security?

2. Whether, in such a case, a Plaintiff's capacity to demonstrate pretextuality of such a national security justification for such surveillance activity directed against

a domestic political organization would defeat the above-specified immunity defense?

3. Whether a plaintiff in such a case should be permitted to conduct discovery designed to determine whether the claimed national security justification was pretextual and whether such discovery would be foreclosed by this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982)?

4. Whether Harlow vs. Fitzgerald, supra, should be interpreted as precluding such discovery in cases in which a proferred immunity defense rests upon a claim of national security as the justification for challenged surveillance?

5. Whether the availability of such a defense would depend upon whether a national security purpose for challenged

electronic surveillance was the sole or primary purpose designed to be served by such activity or upon whether other purposes assumed substantial importance?

6. Whether the government can defeat a plaintiff's claim to have been subjected to electronic surveillance by providing affidavits from officials attesting to the fact that searches of official records yield no evidence of any such interceptions even though plaintiffs, in resisting such summary judgment claims, can establish that the government has previously made numerous misrepresentations concerning the status of such records during the conduct of prior criminal proceedings dismissed in part because of judicial concern that those records had in fact been destroyed or lost?

7. Whether the record in this case served to establish the existence of an

adequate objective "national security" basis for the warrantless wiretapping of offices of the Black Panther Party in Los Angeles, California, pursuant to an authorization by Defendant John N. Mitchell?

8. Whether the record in this case demonstrates an adequate basis for Plaintiff's claim that such surveillance activity was in fact politically motivated and that the claimed national security justification was pretextual in this case? 1/

1/ The parties before the Court of Appeals below were Plaintiffs and Appellants Anthony Joseph Russo, Jr., and H. Peter Young. Other plaintiffs in the case, Daniel Ellsberg, et al., vs. John N. Mitchell, et al., 84-5574, 807 F.2d 204 (D.C. Cir. 1986), had been previously dismissed and were not parties to this appeal. Those plaintiffs included Daniel Ellsberg, Stanley K. Sheinbaum, Leonard B. Boudin, Charles E. Nesson, Arthur I. Berman, Delores A. Donovan, Richard Falk, Leonard I. Weinglass, Jeffrey B. Kupers, Barrett S. Litt,

Michael P. Balaban, Barry Portman, Robert Sheer and Adam Bennion along with Morton Halperin, Charles E. Goodell and Thomas Hayden. Both Appellants Russo and Young are petitioners herein. Defendants and Appellees below were John N. Mitchell, Richard Kliendienst, Patrick Gray, III, John E. Ingersol, Vernon D. Acree, James J. Rowley, Charles Walters, William Rogers, Melvin Laird and Richard Helms. Defendatns were sued both individually and in their representative capacities, respectively, as Attorney General, Director of the F.B.I., Director of the Bureau of Narcotics and Dangerous Drugs, Commissioner of the Bureau of Customs, Director of the Secret Service, Commissioner of the Internal Revenue Service, Secretary of State, Secretary of Defense and Director of the Central Intelligence Agency.

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v.

JOHN N. MITCHELL, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Ellsberg vs. Mitchell, 807 F.2d 204 (D.C. Cir. 1986), is attached hereto as Appendix A. That opinion is one of three cases decided together by the Court of Appeals

which raise similar questions of law. The other two cases are Halperin v. Kissinger, 807 F.2d 180 (D.C. Cir. 1986), and Smith v. Nixon, 807 F.2d 197 (D.C. Cir. 1986). The Court of Appeals' unreported order filed January 12, 1987, announcing the denial of Appellants' Petition for Re-Hearing is attached hereto as Appendix B, (8a), and its unreported order (9a-10a) filed the same date denying Appellants' Suggestion for Re-hearing En Banc is attached as Appendix C. Also included as appendicies to this Petition are pertinent unreported orders of the district court. These include Appendix D, the order of November 16, 1982 granting John N. Mitchell's motion for a protective order, (11a, infra), Appendix E, the order of December 23, 1982, granting summary judgment to Defendants Rowley, Rogers, Laird and Helms,(12a-16a),

Appendix F., (17a-18a), the order of December 23, 1982 dismissing Plaintiff Russo's claims for lack of standing, Appendix G, (19a), the order filed on February 1, 1983, denying Russo's Motion for Alteration and Amendment of the Judgment, Appendix H, (20a-22a), the order filed February 1, 1983, modifying the order reproduced as Appendix E, and Appendi I, the order filed July 22, 1983, granting summary judgment to Defendant John Mitchell as to claims of Plaintiff Young. (23a-30a).

JURISDICTION

The judgment of the Court of Appeals was filed on December 5, 1986, and a timely Petition for Re-Hearing and Suggestion for Re-Hearing En Banc was denied by orders filed on January 12, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment of the United States Constitution and its prohibition of "unreasonable searches and seizures" along with 18 U.S.C. section 2510, et seq., and this Court's decision in Harlow vs. Fitzgerald, 457 U.S. 800 (1982).

STATEMENT OF THE CASE

The present case, Ellsberg v. Mitchell, arose out of the fameous "Pentagon Papers" trial, United States of America v. Anthony Joseph Russo, Jr., and Daniel Ellsberg, Central District of California Crim. No. 9373-WMB, which was dismissed due to governmental misconduct in May of 1973. During the course of this trial, the government, after a long series of mis-representations, finally admitted that various defendants and

defense team members in that case had suffered electronic interception of telephone conversations. The present litigation was then commenced against various government officials, including the Attorney General. Damages were sought under the Fourth Amendment of the United States Constitution and under 18 U.S.C. section 2510, et seq., Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Plaintiff Russo was one of the two defendants in the Pentagon Papers trial, and Plaintiff Young was one of Russo's defense attorneys.

During discovery in this case, the government admitted that four of Young's conversations had been intercepted by the F.B.I. in connection with a warrantless wiretap of the Black Panther Party's Los Angeles Chapter which had been authorized by Defendant

John N. Mitchell as Attorney General of The United States. The government also admitted that Plaintiff Daniel Ellsberg had suffered interception in connection with a wiretap placed on the telephone of co-Plaintiff Morton Halperin. The latter wiretap became the subject of litigation in Halperin v. Kissinger, 807 F.2d 180 (D.C. Cir. 1986), a companion of the present Court of Appeals decision. Additionally, the government admitted that one or more plaintiffs had suffered interception of conversations in connection with what was described as foreign intelligence surveillance activity and declined to identify the intercept victims on grounds related to its assertion of the state secrets privilege, which was upheld by the Court of Appeals in Ellsberg v. Mitchell, hereinafter described as Ellsberg I, 709 F.2d 51 (D.C.Cir . 1983). Finally,

the government asserted that neither Russo nor Young had been overheard in connection with any additional non-disclosed and non-privileged surveillance activity. Ellsberg I was concerned solely with the government's state secret privilege claims pertaining to foreign intelligence surveillance, while Young's claims regarding the Black Panther Party wiretap concerned surveillance of a domestic political organization. Consequently, the present litigation continued even after the conclusion of Ellsberg I.

Various defendants then filed successive summary judgment motions. Summary Judgment was granted to Defendants Ingersoll, Walters Kleindienst, Gray and Acree on June 10, 1982. (Joint Appendix on Appeal, hereinafter designated as JA, page 18). On May 17, 1982, Defendants Rowley, Rogers, Laird and Helms filed for summary judgment. Plaintiff Russo, after filing a Substitution of Attor-

torneys on July 1, 1982, (id.), filed a memorandum opposing the latter summary judgment motion. (JA 19). Plaintiff Young then also retained new counsel and adopted Russo's arguments. Both Plaintiffs then noticed the deposition of Defendant Mitchell, who moved for and obtained a protective order granted on November 19, 1982. (JA 20; Appendix D, 11a, infra). The government moved for summary judgment as to all claims by Russo, claiming that there was no evidence that he had ever suffered electronic interception through operations not covered by its state secrets claim, i.e. through "non-privileged " surveillance. Russo opposed the motion and, along with Young, sought additional discovery and moved to dissolve the protective order. (JA 20). The district court then granted the summary judgment motion of Defendants Ruwley, Rogers, Laird and Helms through an

order filed on December 23, 1982. (JA 20; Appendix E, 12a-16a, infra). That same day, the district court entered summary judgment as to all claims by Plaintiff Russo. (JA 20; Appendix F, 17a-18a, infra). The dismissal of Russo's claims was based upon the ground that Russo lacked standing to proceed, since there was no evidence that he had been overheard in connection with any non-privileged surveillance. (id.). The court then denied Plaintiff's Motion for Alteration and Amendment of the Judgment against him (JA 21; Appendix G, 19a, infra) and denied Plaintiffs' motion to dissolve the protective order. (JA 21) The district court also modified its previous order dismissing claims against Rowley, Rogers, Laird and Helms to reflect the fact that Young had been overheard in connection with the Black Panther Party surveillance. (JA 21; Appendix H, 20a-22a,

infra). It then granted a motion for summary judgment by the one remaining Defendant, John N. Mitchell, against Plaintff Young. (JA 22; Appendix I, 23a-30a, infra). Young had opposed the motion and had again unsuccessfully renewed his motion to vacate the protective order which precluded his conduct of Mitchell's deposition. (JA 22).

The Court of Appeals upheld the denial of Plaintiffs' attempts to depose Mitchell and affirmed the grant of summary judgment in his favor, which had been based upon a qualified immunity defense. The Court reasoned that there was an adequate objective basis for Mitchell's claim that the Black Panther Party surveillance was inspired by national security concerns and was thus not clearly foreclosed by established law. The Court also held that Harlow v. Fitzgerald, 457 U.A. 800 (1982), foreclosed any inquiry into the

possible pretextuality of Mitchell's assertion that his surveillance authorization was inspired by national security purposes. The Court's reasoning in this regard was more fully set forth in its companion decisions, Halperin vs. Kissinger, supra, and Smith v. Nixon, supra.

The Court of Appeals also upheld the dismissal of Russo's claims and any additional claims by Young, finding inadequate their attempts to establish the existence of a triable issue of material fact concerning the trustworthiness of official representations regarding the state of government electronic surveillance records.

REASONS FOR GRANTING THE WRIT

This case raises questions crucial to the interpretation of Harlow v. Fitgerald, supra, 457 U.S. 800 (1982), in which this Court modified the qualified immunity defense by holding that government officials

"performing discretionary functions were to be 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Id. at 818[.]" (Halperin v. Kissinger, supra, 807 F.2d, 184). In the present case, Mitchell authorized a warrantless wiretap of the Black Panther Party offices in Los Angeles during a period preceeding this Court's decision in United States v. United States Distric Court (Keith), 407 U.S. 297 (1972), which held that the warrant requirement applies to electronic surveillance of domestic organizations undertaken for national security purposes. Mitchell has argued throughout that his authorization of the Black Panther Party wiretap surveillance did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known" and

that for this reason, he is entitled to summary judgment under Harlow's reformulated qualified immunity defense. Petitioner Young has consistently maintained, however, that the question of whether this surveillance was actually undertaken for valid national security purposes or was instead conducted for political or law enforcement ends disguised by a pretextual national security claim is itself a question of fact the existence of which would preclude summary judgment in Mitchell's favor and would entitle Plaintiff to depose Mitchell in responding to his summary judgment motion. (5a-61, infra, Appellants' Brief, 10-29).

The Court of Appeals rejected Young's contention. Its reasoning was actually more completely set forth in its companion Halperin decision, although, as shall shortly appear, the standards set forth in Halperin are actually in sharp conflict from those employed in upholding the disposal of Plaintiff Young's

claims against Mitchell.

In Halperin, supra, Justice Scalia, sitting as Circuit Justice, conceded that while Harlow precludes inquiry into a government's official's understanding of the state of the law in testing his immunity claim, it has been consistently interpreted as permitting an inquiry into the purposes for which his or her actions were undertaken, since "the defendants' intent in performing their acts is crucial to the legitimacy of those acts under clearly established law[.]" (Halperin, supra, 185). While concluding that "[t]o give genuine effect to the Supreme Court's intimation in Harlow that it was instituting a new regime of '[r]eliance on the objective reasonableness of an official's conduct,' 457 U.S. at 818 . . .it would be necessary to preclude, for purposes of the qualified immunity determination, any inquiry into

whether a requisite validating intent (e.g., national security motivation) in fact existed[,]"(Halperin, supra, 185-186), the Court conceded, "It is, to say the least, unclear whether Harlow intended that result--or indeed whether it even had in mind the problem of legitimizing or illegitimizing intent except insofar as intent is effected by the defendant's knowledge of the state of the law." (id, 186). Admitting that "[n]o court, as far as we are aware, has extended Harlow's proscription of subjective inquiry beyond the issue of knowledge of the law and intent related to knowledge of the law, except in a national security context[,]" (id), the Court, citing district court decisions, announced that precisely such an extention would be appropriate in cases in which the articulated purpose for challenged conduct involved national secur-

ity claim. Such an expansion of Harlow, reasoned the Court, would be warranted in view of the fact that "the harm produced by 'dampen[ing] the ardor of [public officials] in the unflinching discharge of their duties,' Harlow, 457 U.S at 814. . . is particularly severe in the national security field, since, 'no governmental interest is more compelling,' Haig v. Agee, 453 U.S. at 307." (Halperin, supra, 187). The Court then cited prior Supreme Court decisions in support of its conclusion that "[t]he concept of a special rule for national security matters is no stranger to court made law--from reduced dur process requirements, See Haig v. Agee, 453 U.S. at 309, . . .Cole v. Young, 351 U.S. 536, 546-547 . . .(1956), to increased ability to impinge upon interests protected by the first amendment, see Snepp v. United States, 444 U.S. 507, 509, n. 3. . .(1980), to

authority (where foreign powers are involved) to conduct warrantless searches, see United States v. Truong Dinh Hung, 629 F.2d 908, 913-916 (4th Cir. 1980)." (Halperin, supra, 187).

It is obvious that the Court's reasoning raises a number of issues which have not been resolved by the Supreme Court.

The first of those issues is whether Harlow does indeed permit discovery of purpose-related intent as distinct from inquiry directed toward an attempt to ascertain an official's understanding of the law. While the Supreme Court has not passed on this question, which was not presented in Harlow, Petitioner agrees that precisely because of this latter fact, Harlow does not justify preclusion of intent-related discovery designed to shed light upon the question of whether an official's conduct was inspired by

purposes which bring it within an area of unsettled law.

The second obvious question, however, is whether Harlow may be interpreted as precluding precisely such purpose-related discovery simply because the purpose announced by defendant officials involves national security claims. Can an official, by the simple device of asserting that his conduct was designed to protect the national security, gain immunity from discovery designed to investigate whether that claim is a pretext? The Court of Appeals has answered this question affirmatively. Harlow, however, does not even reach this question, and only district court opinions were cited by the Court of Appeals as supporting its conclusion. The present Halperin-Smith-Ellsberg triology of cases represents the first instance in which such a rule has been adopted at the circuit level.

The Court of Appeals' reliance upon decisions establishing the special character of "national security" as a claimed justification for official conduct simply casts doubt upon its ultimate conclusion. Haig v. Agee, supra, 453 U.S. 280 1981), concerned the Secretary of State's power to revoke the passport of a former C.I.A. agent. Cole v. Young, 351 U.S. 536 (1956), supra, addressed the power to remove employees with access to classified information who are suspected as security risks. Snepp v. United States, supra, 444 U.S. 507 (1980) concerned the C.I.A.'s power to enforce a contractual provision obligating former agents to submit their manuscripts for pre-publication review by the Agency. The last case cited by the Court in Halperin, United States v. Truong Dinh Hung, 629 F.2d 908, 913-916 (4th Cir. 1980), was an

espoinage prosecution.

Wheatever may be said about each of those cases, the most pertinent observation which can be made at this juncture is that they are readily distinguishable from the present matter. Each of those cases at least pertains to matters which may arguably concern the foreign relations of the United States. This is certainly true of espionage cases, security risk cases and cases involving former C.I.A. agents whose conduct threatens to disclose state secrets. The Court of Appeals, however, applied its novel national security interpretation of Harlow v. Fitzgerald to the claims of Petitioner Young, who suffered interceptions arising out of the warrantless telphonic surveillance of a domestic political organization. The problems with such an analysis are potentially staggering, as shall be demonstrated.

The Court of Appeals' decisions in these three cases require this Court to decide whether the pretextuality of a justification, which, the Court assumed, may ordinarily be asserted to defeat a qualified immunity defense, may not be asserted for this purpose in cases in which the officially proferred purposes for challenged conduct involve a claimed national security foundation. Additionally, the present case in particular raises the special question of whether such a national security rule in qualified immunity cases is appropriate as applied to surveillance of domestic political organizations.

What makes a grant of certiorari exceptionally critical in this case is the conflict whith obtains between the Ellsberg and Halperin opinions concerning the objective showing which must be made by a qualified immunity

claimant. In Halperin, the district court had "granted summary judgment because the 'objective record . . . reflecte[d] a rational national security concern.' 578 F. Supp. at 234." (Halperin, supra, 807 F.2d 188). This was precisely the holding of the district court in the present case. In explaining its grant of summary judgment to Mitchell on qualified immunity grounds, the district court stated, "The objective record thus establishes a valid rationale for the surveillance." (28a-29a, infra, Appendix I). Significantly, such language was deemed inadequate by the Court of Appeals in Halperin, which held, "That is not enough, however, to entitle defendants to summary judgment.. . . A straightforward application of Rule 56(c) to the objective national security inquiry . . .requires (at least in a case where it is uncontested that the defendants

purported to be acting for national security reasons) that defendants adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons." (Halperin, supra, 188-189). The Court of Appeals then applied its objective test to the facts available before the district court, and concluded, "The Distric Court, believing it irrelevant whether Dr. Halperin had access to information that was actually leaked, . . . based its summary judgment of qualified immunity on the uncontested observation that Dr. Halperin 'was exposed to [classified] national security information while on the NSC staff.' 578 F. Supp,, at 234. That

scintilla of evidence, while it might suffice to demonstrate a 'rational national security concern,' Id., is far from the quantum of evidence that would compel every reasonable jury to conclude that the decision to initiate a wiretap on national security grounds was objectively reasonable." (Halperin, supra, 807 F.2nd, 190). Yet in the present case, Justice Scalia, again writing for the Court of Appeals, applied precisely the type of minimal or mere scintilla test which had rejected as inadequate in Halperin, observing, "Defendants have alleged sufficient objective facts to place the wiretap of the Los Angeles Chapter of the Black Panther Party (which intercepted all four conversations at issue here) in a rational national security context." (Ellsberg v. Mitchell, supra, 807 F.2d, 207, Appendix A, 5a, infra).

Utterly absent from the Ellsberg opinion is any conclusion that Mitchell had "alleged sufficient objective facts . . that would convince every reasonable jury to conclude that the decision to initiate a wiretap on national security grounds was objectively reasonable." (Halperin, 190; Ellsberg, supra). Instead, the Court of Appeals in Ellsberg simply reproduced the district court's language as dispositive in Mitchell's favor even though similar district court language in Halperin had been explicitly rejected on appeal as inadequate.

Halperin and Ellsberg thus conflict with each other in their respective formulations concerning the type of objective showing in national security immunity cases which would suffice, according to the Court of Appeals, to justify a special departure from what was characterized in Halperin as

a "straightforward application of Rule 56(c) to the objective national security inquiry[.]" (id., 189). As has already been mentioned, it is by no means clear that this Court would conclude that such a departure is warranted in such cases. The need for review by this Court is certainly enhanced by the fact that two decisions advocating such a special rule articulate distinctly different tests governing its availability.

There is yet an additional special basis for certiorari in this particular case. While Halperin was an executive branch official whose subjection to electronic surveillance was pruportedly inspired by concern over the possibility of his participation in the release of sensitive information to the media, the Black Panther Party wiretap presents a significantly weaker basis for claiming

either that "[d]efendants have alleged sufficient objective facts to place the wiretap . . .in a rational national security context" (the Ellsberg test) or that "defendants [are able to] adduce sufficient facts [demonstrating] that no reasonable jury. . . could conclude that it was objectively unreasonable for defendants to be acting for national security reasons." (the Halperin test). The Court of Appeals, faced with the fact that Appellees' Brief cited no evidence of record in this case concerning the objective basis for Mitchell's national security claims, made the following observation on this point: "We so held in a previous challenge to the legality of the same wiretap. Sinclair v. Kliendienst, 645 F.2d 1080, 1082-1085 (D.C. Cir. 1981). The Black Panther Party was known to have had 'contacts with foreign revolutionaries,' id., at 1082, which, we emphasized, 'provide the clear-

est justification for a national security exception to Title III,' id. at 1084; see also Ellsberg I, 709 F.2d at 71 (MacKinnon, J., concurring in part and dissenting in part) ('[E]xamination . . .leaves to room to doubt that these warrantless surveillances fell within the putative "foreign agent exception" to the warrant requirement of the Fourth Amendment.')." (Ellsberg, supra, 807 F.2d, 207). Yet Ellsberg I did not even pertain to the Black Panther Party surveillance, as is perfectly clear from footnote 2 of Judge MacKinnon's opinion. Its citation as support for Mitchell's immunity claim in the Ellsberg II opinion is simply inexplicable. Furthermore, as was made clear in Appellants' Brief before the Court of Appeals, (id., 17-22), Sinclair v. Kleindienst, in which Petitioner Young was not a party, does not solve the present immunity controversy. In Sinclair, a pre-Harlow case, the court upheld

Mitchell's immunity claim after noting that plaintiffs therein had failed to take his deposition despite the existence of adequate opportunities for such discovery and had thus failed to adduce evidence supporting a claim that Mitchell's purported reliance upon a national security purpose was pretextual. (Sinclair v. Kleindienst, 645 F.2d 1080, 1083-1085. Sinclair simply does not constitute a published judicial determination that Mitchell is qualifiedly immune from liability as a matter of law in connection with the Black Panther Party surveillance. The Court of Appeals in the present case thus cited absolutely no evidence of record to support its conclusion that a national security purpose for this intercept activity was objectively demonstrated.

In the present case, the Court of Appeals upheld a claim of qualified immunity despite the evident lack

of record evidentiary support for a national security purpose's objective viability under even the minimal review standard condemned as in inadequate in the companion Halperin decision. The Court of Appeals' decision involves, it should again be emphasized, electronic surveillance directed against a domestic political organization the program of which was inferably opposed by Mitchell and F.B.I. officials involved in the surveillance activity at issue.

The impact of the Court of Appeals' decision in this case is certainly sobering. It entitles government officials who authorized any such warrantless electronic surveillances directed against domestic political organizations during the pre-Keith period to qualified immunity so long as those organizations were alleged by those officials in their authorization requests to have

contacts with foreign governments or "revolutionaries." Yet such allegations could perhaps be made with reference to scores of relief agencies, human rights organizations, cultural associations, peace groups and others. Considering the fact that Ellsberg II immunizes such surveillance regardless of whether its national security justifications were pretextually advanced, the potential for abuse inherent in the Court of Appeals' special national security interpretation of Harlow is truly enormous.

Plaintiff attempted to depose Mitchell in order to investigate his purposes but was prevented from doing so by protective order. The Court of Appeals in this case held that such discovery would be impermissible given what it described as "the complaint's inadequacy", (id., 207), citing Smith v. Nixon, 807 F.2d 197, 200-201, D.C.

In Smith, the Court of Appeals held that a plaintiff can only conduct discovery in a national security qualified immunity case if he or she can first plead actual facts which contradict the Defendant's claims regarding an objective basis for reliance upon a national security rationals. The circularity of a plaintiff's posture under such a rule is all too obvious, since discovery may well be required if the plaintiff is ever to acquire the very factual basis for pleading allegations that are essential, under such a rule, for discovery in the first place. The Smith rule rests upon the proposition advanced in Halperin that by claiming a national security purpose and by establishing an objective basis for its assertion (under either the Halperin or Ellsberg test), an official becomes entitled

to qualified immunity. The additional problem presented by Smith is that unless a plaintiff already knows the very facts which are essential even to challenging the objective basis for such a claim, he will never be able to acquire them through discovery. The Smith rule in effect creates what amounts to an absolute bar to discovery in qualified immunity cases in which a defendant has established an objective basis (under either case law test) for a national security justification.

The need for this Court's consideration of the substantive and procedural problems created by Ellsberg, Smith and Halperin is apparent. Since this Court has never considered the Court of Appeals' proposed national security modification of Harlow, it has provided no authority for the Smith decision's de facto preclusion of discovery in such cases. Plaintiff maintains that he should have

to depose Defendant Mitchell in order to explore the possible pretextuality of his claim. In opposing Defendant's motion, Plainitff introduced copies of various F.B.I. documents detailing that agency's involvement in politically motivated attempts to disrupt civil rights organizations in connection with its discredited COINTELPRO activities. A deposition would have enabled Plaintiff to explore the question of the instant wiretap's possible relatioship to COINTELPRO, thus casting doubt upon the legitimacy of Defendant's national security justification. Unless this Court upholds Halperin's national security modification of Harlow, such discovery could have sufficed to defeat Defendant's entire immunity claim. 1/

1/ Incidentally, the Court of Appeals claimed that Plaintiff had abandoned his Fourth Amendment claims. This is not so. Appellants' Opening Brief, pp 21-22. Ellsberg opinion, footnote 2.

The case also warrants Supreme Court review because it presents questions concerning the means by which summary judgment claims are adjudicated in situations in which the government has exclusive access to records pertinent to establishing a basis for relief. The government claimed that examination of its wiretap records disclosed no indication that Petitioner Russo had ever been overheard on any so called non-privileged wiretaps or that Petitioner Young had ever been overheard in connection with any non-privileged surveillances except the above-mentioned Black Panther Party tap. Plaintiffs opposed the government's summary judgment motion by asserting various facts designed to demonstrate that in the context of this case, governmental assurances regarding the state of official wiretap records were simply not trustworthy. The Court of

Appeals, while citing affidavits in which Petitioners set forth various events providing a basis for their beliefs that they had respectively been targeted for undisclosed surveillance efforts, dismissed their contents as speculative and ignored the most important part of Petitioners' factual presentation on this issue. The Court made no mention of the fact that during the Pentagon Papers trial, the government had repeatedly assured the district court in that case that the defendants, their attorneys and their consultants had not been electronically overheard. In December, 1971, a Deputy Attorney General denied under oath that Ellsberg had ever been overheard. (Ex 1 in support of Russo opposition to summary judgment motion by Rowley, Rogers, Laird and Helms). The prosecutor then filed a similar affidavit containing identical assurances about all of this case's original plaintiffs. (Id., Ex. 2).

The following month, in June of 1982, a Deputy Assistant Attorney General then announced under oath that record searches failed to disclose any interception of Ellsberg or Russo. (Ex. 3). Only in July of 1972 did the prosecution first admit that one or more plaintiffs had suffered interception. However, in December of 1972, an Assistant Attorney General stated under oath that neither Russo nor Ellsberg had ever been thus overheard. (Id., Ex. 5). In an in camera submission that day, the government for the first time admitted that a defense attorney had been electronically intercepted. (Ex. 6). Because this announcement contradicted previous representations, the court issued a new disclosure order, with which the government complied with assurances in January of 1973 that its current disclosures were now complete. (Id., Ex. 8).

Yet another affidavit was forthcoming from the government attesting to the thoroughness of prior document searches. (id., Ex. 10). In its amended answer to this litigation, which was commenced during the Pentagon Papers trial, the government again stated that electronic survelliance against plaintiffs pertained only to a defense attorney and a consultant. (Amended Answer, paragraph 4, Seventh Defense).

On May 11, 1973, the trial judge dismissed all charges against Russo and Ellsberg. In explaining his order, the judge noted that within the preceeding forty-eight hours, after both sides had rested, the government had disclosed having intercepted conversations of defendant Ellsberg. The court noted that the government now admitted an inability to provide the identities of intercept victims, the dates of interceptions, the

numbers of interceptions, the location of the surveillance authorizations, the location of the surveillance logs, tapes or other records of intercept activity or what had happened to these items. The Court also noted that those documents had been missing since 1971 and had, according to the F.B.I., been removed from both the Justice Department and the F.B.I. file systems, although they once existed. (id., ex. 13).

Under such circumstances, Plaintiffs were certainly entitled to argue that a triable issue of material fact exists concerning the trustworthiness of official representations regarding the state of governmental wiretap records pertaining to these plaintiffs. In any event, dispositive records may well have been lost or destroyed, therey eliminating the propriety of summary judgment in support of governmental

assurances that plaintiffs had suffered no undisclosed electronic interception.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant Petition be granted.

Respectfully Submitted,

DATED: April 12, 1987

LAWRENCE TEETER
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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5574

DANIEL ELLSBERG, ET AL., APPELLANTS

v.

JOHN N. MITCHELL, ET AL.

Appeal from the United States District Court
for the District of Columbia

Argued May 1, 1985

Decided December 5, 1986

Lawrence Teeter for appellants.

Larry L. Gregg, Attorney, United States Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Barbara L. Herwig*, Attorney, United States Department of Justice, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: ROBINSON and MIKVA, *Circuit Judges*, and SCALIA,* *Circuit Justice*.

Opinion for the Court filed by *Circuit Judge* SCALIA.

SCALIA, *Circuit Justice*: This is the last in a series of three cases we decide today relating to the qualified immunity defense in the national security context. *See Halperin v. Kissinger* (*"Halperin II"*), No. 84-5095, slip op. (D.C. Cir. Dec. 5, 1986); *Smith v. Nixon* (*"Smith II"*), No. 84-5240, slip op. (D.C. Cir. Dec. 5, 1986). As in the companion cases, plaintiffs seek damages from federal executive officials for allegedly violating their constitutional and statutory rights by electronically intercepting their telephone conversations. Defendants claim that qualified immunity shields them from liability since the wiretap, having had a validating national security purpose, did not violate clearly established law. The issue is whether plaintiffs have presented sufficient concrete facts to avoid summary judgment, without further discovery, on their assertions that defendants' putative national security purpose was objectively unreasonable and that plaintiffs were subject to other illegal interceptions the existence of which defendants have concealed.

I

This case, the factual background of which is recited more fully in our earlier decision, *see Ellsberg v. Mitchell* (*"Ellsberg I"*), 709 F.2d 51, 52-56 (D.C. Cir. 1983), originates in the famous "Pentagon Papers" criminal prosecution, *United States v. Russo & Ellsberg*, Crim. No. 9373 (WNB) (C.D. Cal. dismissed because of government misconduct May 11, 1973), during which the government acknowledged that federal investigators had over-

* Justice Scalia was a judge of this Court when this case was briefed and argued, and is a designated Circuit Justice of this Circuit on the date of this decision. *See* 28 U.S.C. §§ 42, 43(b) (1982).

heard one or more members of the defense team through warrantless wiretaps. Anthony J. Russo, Jr., a defendant in that case, and his defense lawyer, H. Peter Young, along with Russo's codefendant and other members of the defense team who are no longer parties here, brought this damage action against several federal agencies and former federal officials, including Attorney General John N. Mitchell, Secret Service Commissioner James J. Rowley, Secretary of State William Rogers, Secretary of Defense Melvin Laird, and Central Intelligence Agency Director Richard Helms. Both plaintiffs alleged that defendants violated their rights under the fourth amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211 (current version as amended by Title II of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 1796, codified at 18 U.S.C. §§ 2510-2520 (1982)). (First and sixth amendment claims were also raised, but have not been preserved in this appeal.)

In the course of discovery (pursuant to which Mitchell and the defendant agencies were required to acknowledge all wiretaps whose acknowledgement was not precluded by the government's invocation of the state secrets privilege, *see Ellsberg I*, 709 F.2d at 59; *Ellsberg v. Mitchell*, Civ. No. 1879-72 (D.D.C. Nov. 6, 1981) (Order) defendants disclosed that four of Young's conversations were overheard between September 17, 1970 and June 23, 1971, during wiretap surveillance of the Los Angeles Chapter of the Black Panther Party. Defendants denied the existence of any interceptions of Russo's conversations and of any other interceptions of Young's conversations, not covered by the state secrets privilege. (Interceptions covered or not covered by the state secrets privilege will hereinafter be referred to as "privileged" or "nonprivileged" interceptions, respectively.)

Despite plaintiffs' pending discovery requests, the District Court granted summary judgment to defendants

Rogers and Rowley on the basis of plaintiffs' failure to allege that they engaged in any illegal activity, and to defendants Laird and Helms for plaintiffs' failure to allege that they were personally involved in the interception, use, or disclosure of any interception of plaintiffs' communications. *Ellsberg v. Mitchell*, Civ. No. 1879-72 (D.D.C. Dec. 23, 1982) (Mem. Order), *amended by Ellsberg v. Mitchell*, Civ. No. 1879-72 (D.D.C. Feb. 1, 1983) (Order). In a separate order, the District Court also dismissed Russo's suit entirely because he was not overheard on any nonprivileged wiretap. (D.D.C. Dec. 23, 1982) (Order). Later, also despite Young's pending discovery motions, the District Court granted summary judgment to Mitchell on qualified immunity grounds against Young, finding that the "objective record thus establishes a valid [national security] rationale for the surveillance." *Ellsberg v. Mitchell*, Civ. No. 1879-72, slip op. at 4 (D.D.C. July 22, 1983) (Mem. Order). Plaintiffs appeal both orders.[1] We address them in reverse order.

II

In granting summary judgment to Mitchell on qualified immunity grounds, the District Court properly reasoned that "*Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982),] pre-

---

[1] A seven-line paragraph in plaintiffs' brief, without citation to any authority, challenges the District Court's order of June 10, 1982, Brief for Appellants at 45—which the brief erroneously refers to elsewhere as "[t]he order of May 28, 1982," *id.* at 3—dismissing defendants Walters, Ingersoll, Acree, Kleindienst, and Gray. However, plaintiffs failed to file a notice of appeal of that order, *see* Notice of Appeal (listing only orders of Dec. 23, 1982 and July 27, 1983), made no reference to the issue in their statement of issues presented, and declined to respond to defendants' assertion that such omissions constituted a waiver of appeal as to that order. Accordingly, that ground of error has been waived. *See* FED. R. APP. P. 3(a), 28(a); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). *Compare Black Panther Party v. Smith*, 661 F.2d 1243, 1276-77 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982).

5

cludes us from . . . asking if national security was the actual or only reason for defendant's conduct," *Ellsberg*, slip op. at 4, where, as here, there is no dispute that defendants purported to act out of national security concerns, *see Halperin II*, slip op. at 16-17.

Defendants have alleged sufficient objective facts to place the wiretap of the Los Angeles Chapter of the Black Panther Party (which intercepted all four conversations at issue here) in a rational national security context. We so held in a previous challenge to the legality of the same wiretap. *Sinclair v. Kleindienst*, 645 F.2d 1080, 1082-85 (D.C. Cir. 1981). The Black Panther Party was known to have had "contacts with foreign revolutionaries," *id.* at 1082, which, we emphasized, "provide the clearest justification for a national security exception to Title III," *id.* at 1084; *see also Ellsberg I*, 709 F.2d at 71 (MacKinnon, J., concurring in part and dissenting in part) ("[E]xamination . . . leaves no room to doubt that these warrantless surveillances fell within the putative 'foreign agent exception' to the warrant requirement of the Fourth Amendment.").

Even after considerable document discovery, plaintiffs can point to no objective facts that suggest a conclusion contrary to *Sinclair*. Instead, based on indicia of Mitchell's "law enforcement philosophy," Brief for Appellants at 29, and a catalogue of allegedly illegal *FBI* activity (entirely unrelated to the challenged wiretap), *id.* at 22-29, they urge us to find that Mitchell's assertion of a national security purpose was pretextual. As we have said, such a subjective inquiry is not permitted. *See Halperin II*, slip op. at 15; *Smith II*, slip op. at 5-6. Since (in light of the complaint's inadequacy) even the discovery that plaintiffs have already conducted should not have been allowed, *see Smith II*, slip op. at 5-6; *Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985), plaintiffs' requests for further

discovery before the summary judgment determination were properly denied.[2]

III

Plaintiffs challenge the District Court's grant of summary judgment in favor of Rowley, Rogers, Laird, and Helms, and its dismissal of Russo's suit, on the ground that a genuine issue exists as to the truth of the government's denial that plaintiffs were subject to other, nonprivileged wiretaps that the government has concealed. Brief for Appellants at 9. The mere denial of a denial, however, does not suffice to create a genuine issue of fact for purposes of FED. R. CIV. P. 54(c). Plaintiffs alleged no concrete facts that would sustain a finding that such nonprivileged interceptions existed. Plaintiffs argue, in essence, that the government's "prolonged history of fraudulent misrepresentation" regarding its wiretapping activities and other prosecutorial misconduct could convince a jury that federal officials are in the "habit" of concealing such wiretaps from courts and are now behaving pursuant to that "habit." Brief for Appellants at 31 (citing FED. R. EVID. 406 ("Habit; Routine Practice")); *see also id.* at 31-43. Further, each plaintiff enumerates a list of alleged governmental illegalities demonstrating official interest in him during and after the Pentagon Papers investigation and trial. *Id.* at 30, 44-45. For example, Russo alleges that he was subject to unspecified assassination attempts and "death threats from government connected sources." *Id.* at 45. Young alleges that he could not locate some of his office files for several months, and that his car was once unjustifiedly towed, and when he claimed it, local police took two hours to locate a briefcase he had left in it—from which he infers that the

[2] Plaintiffs have not addressed on appeal, and are assumed to have abandoned, the claim that defendants violated any clearly established fourth amendment reasonableness requirements. *See Smith II*, slip op. at 11 n.3. *Compare Halperin II*, slip op. at 22-25; *id.* (Mikva, J., with Robinson, J., concurring).

FBI both burglarized his office and copied documents in his briefcase—from which he urges us to infer that there must have been a wiretap as well. *Id.* at 30.

We decline to license any plaintiff to embark on a fishing expedition in government waters on the basis of such speculation. *Cf. United States v. Kember*, 648 F.2d 1354, 1368-70 (D.C. Cir. 1980) (criminal defendant must bear heavy burden to overcome government's positive denial of electronic surveillance); *United States v. Williams*, 580 F.2d 578, 584-87 (D.C. Cir.) (same), *cert. denied*, 439 U.S. 832 (1978). The extensive documentary discovery in which plaintiffs have already engaged (supplemented by Russo's Freedom of Information Act request) has turned up no concrete facts that would indicate that nonprivileged wiretaps existed. As we noted earlier, even that discovery was impermissibly granted; in addition to the fact that further discovery would evidently be fruitless, it too would be impermissible.

* * * * *

The judgments of the District Court are

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 84-5574 September Term, 1986
CA No. 72-01879

Daniel Ellsberg, et al.

v.

John N. Mitchell, et al.

United States Court of Appeals for the District of Columbia Circuit, FILED January 12, 1987 GEORGE A. FISHER, Clerk

BEFORE: ROBINSON and MIKVA, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed December 19, 1986, it is

ORDERED, by the Court, that the petition be denied.

Per Curium

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5574 September Term, 1986
CA No. 72-01879

Daniel Ellsberg, et al.

v.

John N. Mitchell, et al.

United States Court of Appeals for the District of Columbia Circuit

FILED January 12, 1987

George A. Fisher, Clerk

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.C. Ginsburg, Circuit Judges

O R D E R

Appellant's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, By the Court en banc, that appellants' suggestion is denied.

Per Curium

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:

Robert A. Bonner
Cheif Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al.,

PLAINTIFFS,

v.

JOHN N, MITCHELL, et al.,

DEFENDANTS.

Civil No. 1879-72

FILED
November 16, 1982
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the defendants' Motion for a Protective Order, and of the matter submitted in support thereof, and in opposition thereto, and of the whole record of this case, it is this 15th day of November, 1982, ORDERED THAT the deposition discovery sought by Plaintiffs Russo and Young not be had, and FURTHER ORDERED that the notices of deposition presently filed in this case be, and the same are hereby, quashed.

John H. Pratt
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al.,

PLAINTIFFS,

v.

JOHN N. MITCHELL, et al.,

DEFENDANTS.

Civil Action No. 1879-72

FILED
December 23, 1982
JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Plaintiffs in this action contend that defendant officials violated the Fourth Amendment and 18 U.S.C. section 2520 through the warrantless interception, use and disclosure of plaintiffs' communications. Much of this case has been resolved as a result of this Court's orders dismissing claims against Walters, Ingersoll, Acree, Kleindienst and Gray, and the November 23, 1982 stipulation signed by all the plaintiffs (except Daniel Ellsberg, Peter Young and Anthony Russo) disposing of their claims against

all defendants. Four of the five remaining Defendants have now moved for partial summary judgment against the three remaining plaintiffs. James Rowley, William Rogers, Melvin Laird and Richard Helms ask us to dismiss plaintiffs' claims against them because they were not personally involved in the interception, use or disclosure of plaintiffs' communications.

In response to defendants' motion for partial summary judgment, plaintiffs have requsted additional discovery and have asked that we defer consideration of defendants' motion until plaintiffs are given access to evidence currently in defendants' possession. Mr. Johnson's affidavit details the reasons for his belief that further discovery will reveal that Helms and Laird knew about the electronic surveillance of plaintiffs' communications. Neither his affidavit nor

Russo's response, however, contains any allegations that further discovery will implicate Rowley or Rogers in the illegal activity which is the subejct of this action. IN the absence of such representations, we are compelled to dismiss plaintiffs' claims against ROgers and Rowley.

In considering plaintiffs' claims against Helms and Laird, we are mindful that these defendatns are being sued in their individual capacities. As we noted in our Memorandum Order of June 10, 1982, "[a] public official, sued in an individual capacitiy, may only be found personally liable if plaintiffs establish that the officia. had some personal involvement in the illegal acts at issue," citing Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1975). Given this standard, we must also dismiss plaintiffs' claims against Helms and Laird. Plaintiffs do

not allege that Laird or Helms were personally involved in any electronic surveillance other than the wiretap of the Black Panther Party (BPP). We are not convinced that Helms and Laird had personal knowledge of that wiretap, but even if they did, the remaining plaintiffs in this case were not overheard on that surveillance and therefore have no cause of action against these defendants. The two plaintiffs who were overheard on the BPP wiretap were Scheer and Kupers, and they are no longer a part of this action since, through their attorneys, they agreed to sign the November 23rd stipulation. Russo, Young and Ellsberg cannot resist defendants' motion on the grounds that Helms and Laird had personal knowledge of wiretaps involving other parties.

Because plaintiffs have made no

allegation that Rowley or Rogers was implicated in any way in the illegal electronic surveillance of plaintiffs, and because the only charges against Laird and Helms concern their knowledge about persons who are no longer parties to this lawsuit, it is by this Court thsi 22nd day of December, 1982,

ORDERED that defendants' motion for partial summary judgment dismissing plaintiffs' claims against Rowley, Rogers, Laird and Helms is granted.

John H. Pratt
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al., Plaintiffs, v. JOHN N. MITCHELL, et al., Defendants.	Civil Action No. 1879-72 FILED December 23, 1982 JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the defendants' Motion for Summary Judgment as to the claims of plaintiff Anthony J. Russo and of the matter argued in support thereof and in opposition thereto, and of the whole record in this case, it is by the Court this 23rd day of December, 1982,

FOUND by the Court that there is no genuine issue of fact material to the disposition of this motion, and it is

FOUND that plaintiff Anthony J.

Russo was not the subject of, nor was he overheard on, any warrantless electronic surveillance not within this Court's Order of January 5, 1982.

Based on the foregoing Findings, this Court concludes that plaintiff Russo lacks standing to pursue this action. See Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982). For that reason, this action is dismissed as to all claims of plaintiff Russo against all defendants.

John H. Pratt
UNited States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al., PLAINTIFFS,	Civil No. 1879-72
v.	FILED February 1,
JOHN N. MITCHELL, et al., DEFENDANTS. /	1983 JAMES F. DAVEY, Clerk

ORDER

Upon consideration of plaintiff Anthony J. Russo's Motion for Alteration And Amendment of Order Dismissing Action, and of the matter urged in support thereof and in opposition thereto, and of the whole record in the case, it is, this 31st day of January, 1983,

ORDERED that plaintiff Russo's Motion be, and the same is hereby, denied.

JOHN H. PRATT
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al.,	) Civil Action
	) No. 1879-72
Plaintiffs,	)
	) FILED
v.	) February 1, 1983
	) JAMES. F. DAVEY,
JOHN N. MITCHELL, et al.,	) Clerk
	)
Defendants.	)
	)

ORDER

This Order amends our Memorandum Order filed December 23, 1982 in this action dismissing all claims against defendants Rowley, Rogers, Helms and Laird. We dismissed the claims of plaintiff H. Peter Young against Helms and Laird in the mistaken belief thet only Scheer and Kupers were overheard on the Black Panther Party Wiretap, and that Young therefore had no standing to pursue

his claims against Helms and Laird on the basis of that surveillance. Helms and Laird have now moved this Court to amend that order pursuant to F.R. Civ. P 60(b)(6) in recognition of the fact that Young was overheard on that wire-tap. Helms and Laird also request that the judgment dismissing Young's claims against them be reaffirmed because although Young's conversations were overheard, no disclosure of those conversations was made to anyone outside of the Federal Bureau of Investigation.

Because we find that no disclosure of the Young intercept was made outside of the Federal Bureau of Investigation, and because defendants Helms and Laird had neither the duty or the authority to direct the F.B.I. in the conduct of its operations, it is hereby, this 31st day of February, 1983,

ORDERED that defendants' motion to amend the order is granted and it is further

ORDERED that the Memorandum Order of December 22, 1982, is amended to include the finding that plaintiff Young was overheard on the surveillance of the Black Panther Party, and it is further

ORDERED that judgment in favor of Helms and Laird is affirmed and that all plaintiffs claims against them are dismissed.

John H. Pratt
United States District Judge

APPENDIX I

UNITEED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL ELLSBERG, et al.,	)	Civil Action
	)	No. 1879-72
Plaintiffs,	)	
	)	FILED
v.	)	Jul 22, 1983
	)	James F. Davey,
JOHN N. MITCHELL, et al.,	)	Clerk
	)	
Defendants.	)	

MEMORANDUM ORDER

As part of an action involving various parties filed in 1972, plaintiff H. Peter Young claims damages from former Attorney General John Mitchell and others[1/] for warrantless electronic surveillance of the Los Angeles Chapter of the Black Panther Party. The gravamen of the complaint was that plaintiff was incidentally overheard on four separate occasions on that wiretap.

1/ Mitchell is the remaining defendant, the claims against the others having been dismissed by stipulation.

The suit is predicated on alleged violations by Mitchell of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. section 2510, et seq. (1976) ("Title III"), for illegally authorizing the surveillance. Defendant has moved for summary judgment, claiming that he is protected from suit on the grounds of absolute and qualified immunity. Since we find at the very least, defendant has qulified immunity, we grant defendant's motion.

The doctrine of qualified immunity enunciated in Butz v. Economou, 438 U.S. 478 (1978), was recently reformulated in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982):

> Consistently with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad- reaching

> discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (emphasis added).

102 S.Ct. at 2738.

Plaintiff evidently concedes that when defendant authorized the wiretap of the Black Panther Party in 1969, he could not reasonably have known that the Fourth Amendment or Title III required warrants for national security wiretaps. 3/

2/ We therefore do not reach defendant's claim of absolute immunity.

3/ The Supreme Court had not yet decided U.S. vs. U.S. District Court, 407 U.S. 297 (1972)(known as "Keith"), which held that warrantless wiretaps similar to these at issue, were unconstitutional. Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), which narrowed the national security exemption and only applied prospectively came even later.

See Sinclair v. Kleindienst, 645 F. 2d 1080, 1084 (D.C. Cir. 1981). Plaintiff chooses to argue instead that although defendant could not have known that warrantless electronic surveillance was unconstitutional, Title III's language only allows the electronic surveillance if it was "undertaken for proper national security reasons." 645 F.2d at 1084. Plaintiff posits that the Fourth Amendment and Title III were violated if defendant's motives for authorizing the surveillance were not legitimately grounded in national security concerns. Summary judgment, according to plaintiff is thus inappropriate since plaintiff has had no opportunity to conduct discovery related to Mitchell's motives for ordering the wiretap.

We cannot accept plaintiff's argument because we are convinced that the Supreme Court's purpose in formulating a new

qualitifed immunity test was to prevent the sort of investigation into motives which plaintiff seeks to undertake. Plaintiff overlooks the fact that authorization of electronic surveillance is a "discretionary action" and that Harlow specifically held that the subjective intent of the person taking the action was no longer relevant to the qualified immunity inquiry. Because the motives for these actions are so difficult to discern and efforts to do so " can be particularly disruptive of effective government," 102 S.Ct.at 2738, the Supreme Court has advised courts to rely "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law" to resolve "many insubstantial claims on summary judgment." 1-2 S.Ct. at 2739.

We find that there was more than

sufficient justification for defendant's claim that the wiretaps were undertaken for national security purposes. The Court of Appeals previously found in Sinclair that "Mitchell's authorization memoranda recite adequte facts concerning the surveillance to establish legitimate national security concerns. . . ." 534 F.2d at 1085. The Sinclair court emphasized that it was known that the Black Panther Party had foreign contacts, and "contacts with foreign representatives provides the clearest justification for a national security exception to Title III." 645 F. 2d 1084.[4/] The objective record

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4/ Judge MacKinnon, in his separate opinion in an appeal taken from another aspect of the instant case, wrote "My own examination of the relevant material leaves no room for doubt that these warrantless surveillances fall within the putative 'foreign agent exception' to the warrant requirement of the Fourth Amendment.

thus establisnes a valid rationale for the surveillance. Harlow precludes us from continuing further and asking if national security was the actual or only reason for defendant's conduct. 5/

The materials do not suggest that defendants' foreign intelligence surveillance claims are merely a pretext for politically or prosecutorially motivated surveillance." Ellsberg v. Mitchell, No. 82-1085 (D.C. Cir.May 10, 1983) (MacKinnon, J. concurring in part and dissenting in part.

5/ We agree with defendant that "plaintiff's shotgun approach in attacking the national security predicate" could probably not survive a summary judgment motion even under a subjective qualified immunity test. None of the documents plaintiff uses in an attempt to demonstrate the existence of material issues of fact relate to electronic surveillance and many of the documents predate defendant's tenure as Attorney General. Defendant's Reply at 11. Overall, plaintiff's speculations that defendant may have undertaken the surveillance for illegitimate reasons do not constitute factual issues which are material to the immunity questions before this court. Chagnon v. Bell, 642 F.2d 1248, 1266 (D.C. Cir. 1980), cert denied, 453 U.S. 911 (1981).

We are thus compelled to grant defendant's motion for summary judgment.

Based on the foregoing, it is by the Court this 22nd day of July, 1983,

ORDERED that defendant's motion for summary judgment against plaintiff H. Peter Young is granted.

John H. Pratt
United States District Judge

CERTIFICATE OF SERVICE

I, Lawrence Teeter, hereby declare under penalty of perjury that on April 12, 1987, I mailed three copies of the attached to each of the following:

Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

Larry L. Gregg, Esq.
Attorney, Department of Justice
Civil Division
Washington, D.C. 20530

Michael Krinsky, Esq.
Rabinowitz, Boudin, Standard,
Krinsky and Lieberman
30 East 42nd Street
New York, New York 10007

EXECUTED this 12th day of April, 1987, at Los Angeles, CAlifornia.

_____
LAWRENCE TEETER

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1681

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY JOSEPH RUSSO, JR. AND
H. PETER YOUNG, PETITIONERS

v.

JOHN N. MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

BARBARA L. HERWIG
LARRY L. GREGG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in this *Bivens* action alleging inter alia that respondent Mitchell authorized an illegal warrantless wiretap, the court of appeals properly found him entitled to qualified immunity on the ground that it appeared from the objective record that his actions could reasonably have been motivated by national security concerns.

2. Whether the court of appeals erred in upholding summary judgment against petitioners' claims that their conversations were illegally intercepted by unknown wiretaps, where the government submitted affidavits denying that any such interceptions took place.

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Constitution, statute and rule:

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Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. (& Supp. III) 2510-2520	2, 9
Fed. R. Civ. P.:	
Rule 56	13
Rule 56(e)	13
Rule 56(f)	13

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1681

ANTHONY JOSEPH RUSSO, JR. AND
H. PETER YOUNG, PETITIONERS

v.

JOHN N. MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 807 F.2d 204. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1986, and a petition for rehearing was denied on January 12, 1987 (Pet. App. 8a). The

petition for a writ of certiorari was filed on April 13, 1987 (April 12, 1987 was a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of the "Pentagon Papers" criminal prosecution, during which the government acknowledged that federal investigators had overheard one or more members of the defense team through warrantless wiretaps. Petitioner Russo, a defendant in that case, and his defense lawyer, petitioner Young, along with Russo's co-defendant, Daniel Ellsberg, and other members of the defense team who are no longer parties, brought this action against a number of government officials,[1] asserting violations of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510-2520, arising from the interception of plaintiffs' telephone conversations. Pet. App. 2a-3a.

After the complaint was filed, plaintiffs (including petitioners) served a series of interrogatories

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[1] The defendants named in the complaint included former Attorneys General John Mitchell and Richard Kleindienst; L. Patrick Gray III, former Director of the Federal Bureau of Investigation; John E. Ingersoll, former Director of the Bureau of Narcotics and Dangerous Drugs; Vernon D. Acree, former Commissioner of Customs; James J. Rowley, former Director of the United States Secret Service; Charles Walters, former Commissioner of the Internal Revenue Service; William Rogers, former Secretary of State; Melvin Laird, former Secretary of Defense; and Richard Helms, former Director of Central Intelligence. The complaint stated that the defendants were sued in both their individual and official capacities, but the plaintiffs never asserted any claims for equitable relief.

upon the defendants seeking information regarding the wiretaps. Pet. App. 3a; *Ellsberg* v. *Mitchell*, 709 F.2d 51, 53-55 & n.3 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984). The discovery responses revealed that petitioner Young had been overheard on four occasions during 1970 and 1971 in the course of wiretap surveillance of the Los Angeles Chapter of the Black Panther Party, and that petitioner Russo had not been overheard on any domestic national security wiretap. Pet. App. 3a. Documents produced in response to plaintiffs' discovery demands included the logs of overheard conversations and the memoranda authorizing the wiretap. An explanation of the rationale underlying the wiretap authorization also was provided in response to plaintiffs' interrogatories.[2]

In three separate orders, the district court dismissed petitioners' claims arising out of the Los Angeles wiretap.[3] First, the court entered summary

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[2] The government invoked the state secrets privilege in refusing to supply information regarding any foreign intelligence wiretaps. The district court upheld the privilege and entered a judgment dismissing the claims relating to such wiretaps. The court of appeals generally upheld that determination, and this Court denied certiorari. *Ellsberg* v. *Mitchell*, *supra*. The district court subsequently granted summary judgment in favor of defendants Ingersoll, Walters, Kleindienst, Gray, and Acree on the ground that they were not involved in any of the wiretap surveillance that remained at issue in this case. See Pet. App. 12a. The court of appeals found that petitioners had waived their right to challenge that order (*id.* at 4a n.1), and petitioners do not appear to seek review of that determination. Thus only Mitchell, Rowley, Rogers, Laird, and Helms are respondents in this Court.

[3] Prior to the entry of these orders, the court entered a protective order barring petitioners from deposing former Attorney General Mitchell (Pet. App. 11a).

judgment in favor of respondents James Rowley, William Rogers, Melvin Laird, and Richard Helms. It held that Rowley and Rogers could not be held personally liable because they were not alleged to be involved in any way in the asserted illegal electronic surveillance, and that Laird and Helms likewise could not be held liable because, although they were aware of the Black Panther wiretap, none of the relevant intercepted information was disclosed to anyone outside of the Federal Buréau of Investigation. Pet. App. 12a-16a, 20a-22a. The court rejected petitioners' claim that they were entitled to additional discovery concerning the possible liability of these four respondents (*id.* at 13a-14a).

The district court entered a separate order dismissing petitioner Russo's claims on the ground that "Russo was not the subject of, nor was he overheard on, any warrantless electronic surveillance" that remained at issue in the case (Pet. App. 18a). The court found that Russo accordingly lacked standing to pursue this action.

Finally, applying the standard set forth in this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the district court held that former Attorney General Mitchell was entitled to qualified immunity from damages liability on petitioner Young's claims (see Pet. App. 23a-30a). The court observed that Young conceded that at the time Mitchell authorized the wiretap, "he could not reasonably have known that the Fourth Amendment or Title III required warrants for national security wiretaps" (*id.* at 25a (footnote omitted)). Young instead claimed that "the Fourth Amendment and Title III were violated if [Mitchell's] motives for authorizing the surveillance were not legitimately grounded in national

security concerns. Summary judgment, according to [Young] is thus inappropriate since [Young] has had no opportunity to conduct discovery related to Mitchell's motives for ordering the wiretap" (*id.* at 26a).

Relying on the evidence produced in the present case as well as the court of appeals' decision in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (D.C. Cir. 1981), which also involved a wiretap of an office of the Black Panther Party, the district court found "more than sufficient justification for [Mitchell's] claim that the wiretaps were undertaken for national security purposes" (Pet. App. 27a-28a). Because "[t]he objective record thus establishe[d] a valid rationale for the surveillance," the court stated, "*Harlow* precludes us from continuing further and asking if national security was the actual or only reason for [Mitchell's] conduct" (*id.* at 28a-29a (footnote omitted)). The court went on to note that "even under a subjective qualified immunity test" Mitchell would be entitled to immunity. "None of the documents [Young] uses in an attempt to demonstrate the existence of material issues of fact relate to electronic surveillance and many of the documents predate [Mitchell's] tenure as Attorney General. Overall, [Young's] speculations that [Mitchell] may have undertaken the surveillance for illegitimate reasons do not constitute factual issues which are material to the immunity questions before this court." *Id.* at 29a n.5 (citation omitted).

2. The court of appeals unanimously affirmed (Pet. App. 1a-7a). With respect to the dismissal of the claims against former Attorney General Mitchell, the court upheld the district court's conclusion that Mitchell was entitled to immunity. In a decision ren-

dered the same day in the companion case of *Halperin* v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), the same panel of the court of appeals concluded that where "officials claiming immunity purported at the time they engaged in the challenged conduct to have been motivated by national security concerns, a purely objective inquiry into the pretextuality of the purpose is appropriate. That is to say, if the facts establish that the purported national security motivation would have been reasonable, the immunity defense will prevail" (807 F.2d at 188 (footnote omitted)). Thus, the defendant's action must be assessed with reference to the objective record, not with an eye toward ascertaining the defendant's subjective intent. See also *id.* at 186-193.

Here, the court of appeals found that respondents had "alleged sufficient objective facts to place the wiretap of the Los Angeles Chapter of the Black Panther Party * * * in a rational national security context." Pet. App. 5a, citing *Sinclair* v. *Kleindienst*, *supra*. The court noted that "[e]ven after considerable document discovery, [petitioners] can point to no objective facts that suggest a conclusion contrary to" that reached in *Sinclair* v. *Kleindienst*, 645 F.2d at 1084—that Mitchell's authorization of surveillance and wiretapping of Black Panther Party activities was motivated by national security concerns (Pet. App. 5a).

The court of appeals also upheld the district court's grant of summary judgment in favor of respondents Rowley, Rogers, Laird, and Helms, and the dismissal of petitioner Russo's claims. It rejected petitioners' effort to create a disputed issue of fact by simply contradicting the government's denial that petitioners were subject to other nonprivileged wiretaps,

stating that "[t]he mere denial of a denial * * * does not suffice to create a genuine issue of fact for purposes of Fed. R. Civ. P. 56(c)" (Pet. App. 6a). The court noted that "[t]he extensive documentary discovery in which [petitioners] have already engaged (supplemented by Russo's Freedom of Information Act request) has turned up no concrete facts that would indicate that nonprivileged wiretaps existed," and declined to allow "a fishing expedition in government waters on the basis of such speculation" as petitioners offered to justify further discovery (*id.* at 7a).

ARGUMENT

Petitioners challenge the decision of the court below in two primary respects. They argue that the court erred, first, in upholding the qualified immunity of respondent John Mitchell from liability for authorizing the wiretap of the Los Angeles Chapter of the Black Panther Party and, second, in foreclosing further litigation of petitioners' claims that they had been intercepted by other unknown and unspecified government wiretaps.

1. Petitioners contend (Pet. 11-34) that the courts below erred by concluding that respondent Mitchell was entitled to immunity for claims growing out of the warrantless national security wiretap. This Court considered a similar factual situation in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), holding that prior to 1972 it was not clearly established that the Constitution and Title III barred warrantless wiretaps for national security purposes and that former Attorney General Mitchell was therefore entitled to immunity under the standard announced in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (see 472 U.S. at 530-535). The plaintiff in *Forsyth* argued that

Mitchell was not entitled to summary judgment on the immunity issue because his actions might not have been motivated by national security purposes. This Court rejected that argument, stating that the district court had "held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, not a prosecutorial function for which absolute immunity was recognized" (472 U.S. at 535 n.13). Here, too, the courts below found that Mitchell was entitled to immunity because the wiretap at issue was justified by national security concerns. Pet. App. 5a, 27a-29a.

a. Petitioners first argue (Pet. 17-21) that the court of appeals applied the wrong standard in determining whether the wiretap was justified by national security concerns because the court restricted its inquiry to the objective record regarding the reasons for the wiretap and held that it was not appropriate to examine Mitchell's subjective motivation in approving the wiretap.

In *Harlow* v. *Fitzgerald*, *supra*, this Court addressed the portion of the qualified immunity standard that denied immunity to officials who failed to act in good faith. The Court observed that "[t]here are special costs to 'subjective' inquiries of this kind" (457 U.S. at 816). It found that "[j]udicial inquiry into subjective motivation * * * may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government" (*id.* at 817 (footnotes omitted)). The Court therefore eliminated the subjective component of the immunity standard, holding that an official's entitlement to immunity turns solely on the "objective reasonableness" of his conduct "as meas-

ured by reference to clearly established law" (*id.* at 818 (footnote omitted)).

In *Halperin* v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), a companion case to the case at bar, the court of appeals found that—under the legal standards that were clearly established at the time of the events at issue here—the legality of a warrantless wiretap turned upon its purpose. If the wiretap had a national security purpose, a government official could, prior to 1972, have reasonably believed that the wiretap fell outside the warrant requirement imposed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510-2520, and the Fourth Amendment. Thus, as the court noted, the "clearly established law" test suggested an inquiry into an official's subjective motivation in authorizing the wiretap. See 807 F.2d at 184-185. As the court also noted, however, such an inquiry is to some degree inconsistent with the principles that underlie this Court's decision in *Harlow*, because it requires an investigation of subjective motivation similar to the subjective inquiry rejected by the Court in *Harlow* (see *Halperin*, 807 F.2d at 185-187).

In *Halperin*, the court of appeals resolved the tension between the inquiry mandated by the relevant clearly established law and the principles set forth in *Harlow* by holding that an inquiry into government officials' subjective motivation is not appropriate in the national security context. The court observed that the factors weighing against subjective inquiry were especially strong in that context: the important government interest in preventing hindrance of the proper performance of national security duties, the need for secrecy, and the prominence of the separation of powers concerns noted by the Court in reject-

ing the more generalized subjective inquiry in *Harlow*. See *Halperin*, 807 F.2d at 187. The court also stated that (*ibid.* (citations omitted))

> [t]he concept of a special rule for national security matters is no stranger to court-made law—from reduced due process requirements, to increased ability to impinge upon interests protected by the first amendment, to authority (where foreign powers are involved) to conduct warrantless searches.

At the same time, the court in *Halperin* expressly declined to adopt a rule governing all situations in which clearly established law directs a subjective inquiry. It concluded only that, in the national security context, "a purely objective inquiry into the pretextuality of the purpose is appropriate. That is to say, if the facts establish that the purported national security motivation would have been reasonable, the immunity defense will prevail" (*Halperin*, 807 F.2d at 188 (footnote omitted)).[4]

We submit that the *Halperin* court properly balanced the unique considerations present in the national security context, adopting a rule that preserves a plaintiff's ability to defeat immunity while at the same time avoiding the disruption that would result from a full-blown inquiry into the subjective motivations of government officials who perform national security functions. It is noteworthy that the District of Columbia Circuit appears to have limited this rule to the national security context, specifically rejecting

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[4] Petitioners attempt (Pet. 20) to draw an artificial distinction between domestic and foreign national security. The two areas are obviously related and implicate similar policy concerns.

the argument that *Harlow* bars all inquiry into a government official's subjective motivation when government functions other than national security operations are implicated by a plaintiff's claims. *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431-1433 (D.C. Cir. 1987), reh'g en banc granted on other grounds, No. 85-6071 (D.C. Cir. May 8, 1987).

Petitioners' challenge to the standard applied by the court of appeals consists solely of flat assertions that the court of appeals erred. Thus, petitioners argue (Pet. 17-20) that the court of appeals' decision is not directly compelled by this Court's decision in *Harlow* v. *Fitzgerald*, *supra*, or by this Court's prior decisions recognizing special constitutional rules where national security is involved. But the court of appeals did not contend that the result that it reached was mandated by these prior decisions. Rather, it found that the principles underlying those decisions weighed against an inquiry into subjective motivation in the national security context, and adopted a legal standard consistent with that determination. See *Halperin*, 807 F.2d at 186-188.

Putting the merits of the court of appeals' rule to one side, moreover, petitioners have presented no reason why this Court should grant plenary review to consider the correctness of that rule. They do not contend that the rule adopted by the court below conflicts with a decision of this Court or another court of appeals, and they cannot establish that the proper interpretation of an immunity standard that applies solely to cases involving pre-1972 government wiretaps is an issue of continuing legal importance. Finally, this case presents no occasion to address the general question of the proper approach under *Harlow* where clearly established law suggests a sub-

jective inquiry. Both the court below and other courts of appeals have concluded that an inquiry into subjective intent *is* permissible outside the national security context. There is thus no justification for review by this Court.[5]

Petitioners also contend (Pet. 26-30) that there was insufficient evidence to support the factual finding of the lower courts that the wiretap had a national security purpose. Both courts below found that the relevant facts led inexorably to the conclusion that the wiretap was supported by national

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[5] Petitioners assert (Pet. 21-25) that the decision below conflicts with the decision in *Halperin*, which was issued by the same panel of the District of Columbia Circuit on the same day as the decision in the present case. First, the purported conflict is illusory. The court of appeals in the present case noted that there was no objective evidence weighing against the conclusion that the wiretap on which petitioner Young was overheard was justified by national security concerns (Pet. App. 5a). That determination appears to us to satisfy the standard announced in *Halperin*—that any reasonable factfinder would conclude that the wiretap was justified by national security concerns. Second, even if the decisions could not be reconciled, they would create only an intra-circuit conflict to be resolved by the District of Columbia Circuit, not a conflict warranting review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioners also argue (Pet. 30-31) that there is an "enormous" potential that pretextual justifications would not be discovered under the court of appeals' standard. However, a defendant would be entitled to summary judgment only if any reasonable factfinder would conclude on the objective record before it that the asserted national security justification was objectively reasonable. See *Halperin*, 807 F.2d at 189. Petitioners' complaints (Pet. 32-33) about the unavailability of additional discovery are beside the point, because they seek discovery concerning Mitchell's subjective motivation, which is irrelevant under the objective *Halperin* test that applies where national security matters are concerned.

security concerns. Pet. App. 5a, 27a-29a; see also *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082-1085 (D.C. Cir. 1981) (finding wiretap of Black Panther Party office supported by national security concerns). In light of these concurrent findings of fact, there is no need for this Court to reconsider that fact-bound question. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

b. Even if the court of appeals erred by concluding that the assessment of Mitchell's motivation should be limited to the objective record, review would not be appropriate here because petitioners would fare no better under a subjective standard. Rule 56 of the Federal Rules of Civil Procedure provides that a party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial" or state the reasons why he cannot set forth such facts. Fed. R. Civ. P. 56(e) and (f); see also *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 11 (citation and footnote omitted) ("the issue of fact must be 'genuine.' When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

The district court found that, despite the discovery already allowed in this case, petitioners' submissions did not satisfy that standard. It stated that petitioner Young's "speculations that [Mitchell] may have undertaken the surveillance for illegitimate reasons do not constitute factual issues which are material to the immunity questions before this court" (Pet. App. 29a n.5). The district court correctly concluded that it was proper to grant summary judgment for respondent Mitchell on the present record.

2. Petitioners also contend (Pet. 35-40) that summary judgment should not have been granted as to their allegations that they were overheard on other unknown, nonprivileged wiretaps. They claim that government assurances (in the form of affidavits) that there have been no such wiretaps are inherently untrustworthy, and that, on that basis alone, there is a triable issue of fact. There is no reason for review by this Court of either this fact-bound question, or the issue of whether additional discovery was appropriate on the facts of this case.

The court of appeals' decision is in complete accord with this Court's admonition that, when government officials are sued in their individual capacities, "[i]nsubstantial lawsuits [should] be quickly terminated by federal courts alert to the possibilities of artful pleading" (*Butz* v. *Economou*, 438 U.S. 478, 507 (1978)). Since the "extensive documentary discovery" already obtained by petitioners indicates that any further discovery would be "fruitless" (Pet. App. 7a), the courts below correctly concluded that further discovery was not appropriate on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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